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The return of the subordination scam

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By William A. Kozub

Philosopher George Santayana warned that "those who forget the past are condemned to repeat it." Regrettably, Santayana's warning rings painfully true for the Arizona real estate community in 1998. Real estate agents are once again finding themselves named as defendants in litigation due to their involvements in subordination transactions that bear a clear resemblance to classic Arizona land frauds.

It appears that the growing economic market, and the appearance of a generation of real estate professionals who were not involved in the profession during earlier times when these classic scams made newspaper headlines, has led many agents and brokers to fail to catch this current batch of real estate subordination frauds.

THE SUBORDINATION AGREEMENT

Subordination agreements are a legal tool in the development of real property. Under a subordination agreement, the owner of an interest in real property agrees to take a lower priority than the interest to which it is being subordinated. Often, subordination will allow the owner of real property to obtain construction financing. In order to protect the construction lender, the owner will agree to subordinate their interest to that of the lender. The development project increases the value of the property and all parties win. However, subordination agreements once had a notorious reputation in Arizona as a result in their use in land frauds. It is imperative that all real estate professionals maintain a healthy skepticism when advising their clients in transactions involving subordination agreements.

THE SUBORDINATION SCAM

The prime target for a buyer intending on conducting a subordination scam are sellers who own their property free and clear. In a subordination scam, a buyer approaches the seller or seller's agent with an offer to purchase. The offer will often be for the full listed price, but will require the seller to provide carry-back financing. The offer will also contain any number of provisions that will limit the amount of cash that the buyer must pay out of pocket. Often, the offer provides that the seller's down payment is to be paid out of the proceeds of a new loan that the buyer intends to place on the property at closing.

The offer will also require that the seller agree to subordinate the carryback to this new loan. Thus, at closing, the seller's equity, in the form of a carryback Note/Deed of Trust, will be in second position in priority, behind the new loan. The new loan may often be a "construction loan" or an "acquisition and development loan." When the buyer is not obtaining a construction loan at the close of escrow, there will often be promises of a construction loan in the works or being obtained in the near future. This is designed to lull the seller into a false sense of security. Often, the buyer will promise to pay off in full the seller's carryback from the construction loan proceeds.

Unbeknownst to the seller (or the

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Commissioner's Rules to undergo major rewrite

The Department has proposed significant changes to Title 4, Chapter 28 of the Arizona Administrative Code, familiarly known as the "Commissioner's Rules."

Hearings will be held at the Department's offices at 9 a.m. on August 24 in Phoenix and on August 25 in Tucson to solicit public input on these proposed changes.

The following is a digest of the changes. The complete Rules Package and the required economic impact statement may be found on the Department's Web site at www.adre.org, or may be inspected at the Department's offices in Phoenix and Tucson.

R4-28-101 Definitions

This Section sets forth the terms used within the rules governing the real estate community, pursuant to Title 32, Chapter 20, Arizona Revised Statutes, and will simplify interpretation of responsibility and clarity of purpose.

Some of the definitions in R4-28-201 were moved to R4-28-101 as a more logical location for information relating to the entire Chapter. Terms such as "associate broker," "department," "employing broker," and "member" were already defined in statute and have not been transferred. The term "Attorney General" needs no further clarification. The term "classroom hour" has been replaced with the term "credit hour." Terms "ADEQ" and "ADWR" have been defined to eliminate confusion when explaining "Department" requirements and responsibilities.

In the past, there was confusion when dealing with "trade names," "fic-

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Return of the subordination scam

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seller's real estate agents), the buyer has no intention of ever placing a later construction loan on the property, as the buyer intends only to put into place the new loan, which is an amount far larger than the down payment. The buyer, of course, pockets the difference, an amount frequently in the six or seven figures! Once the seller agrees to the contract and escrow is opened, the buyer then visits a hard money lender for the new loan. Unlike most lending institutions, this type of lender may have no interest whatsoever in the buyer's ability to repay the loan, and may even, in fact, want to obtain the property through a foreclosure. The terms of the loan are extremely oppressive, with a very high interest rate, and severe penalties for default. When the new loan is a construction loan, there will be no provision made for the payment of loan proceeds in draws based upon the completion of work, or the obtaining of lien wavers. The buyer, of course is indifferent to the interest rate and other terms as the buyer has no intention of repaying the new loan. Obviously, the buyer wants the construction loan proceeds paid in one lump sum so that the buyer can obtain the greatest amount of money from their wrongdoing.

Months after closing, it becomes apparent that the buyer has no intention of building on the property. Usually, the first word the seller receives that something is wrong will be missed payments on the carryback. Otherwise, the news will arrive in the form of a Notice of Trustee's sale resulting from the buyer's default under the new loan that is now superior to the seller's carryback. By this time, the new loan is seriously in default, and the seller cannot afford to step back in and pay off the arrearage, much less continue making the exorbitant payments on the new loan. In many instances, the seller's interest will eventually be foreclosed upon by the hard money lender who made the new loan to the buyer. Often, the hard money lender will quickly sell the property and, soon thereafter, also disappear. When the seller finally comprehends what happened, lawyers are retained and lawsuits are filed. Regrettably, the seller's agents will most likely be named defendants.

In this type of scheme, the seller of the property has received little or no down payment, and his equity has been wiped out, or substantially reduced, by the agreement to subordinate the carryback to the acquisition loan. The seller relied upon the agents to protect the seller's interests. Regrettably, the seller's agents were also duped by the buyer as well.

While the use of a subordination clause can be a vehicle for fraud inherently fraudulent. There are numerous ways to substantially reduce the risk to the seller in a transaction involving a subordination agreement. Accordingly, it is imperative that real estate professionals recognize the indicia of a subordination fraud, and learn to take appropriate action in response.

FACTORS TO LOOK FOR WHEN REVIEWING THE TRANSACTION

There are numerous "red flags" that a request for a subordination agreement may be a precursor to a subordination fraud, including any of the following:

I . The seller owns the property free and clear of all encumbrances.

2. The total amount of loans secured against the property, including the seller's carry back, exceeds the fair market value of the property.

3. There is no mechanism by which the seller can monitor the application for the construction loan or the disbursement of construction loan proceeds.

4. The loans to which the seller will subordinate are not purely for construction, but will also be used for the "acquisition" of the property.

5. The terms of the new loan, including interest rate, payment terms, and the existence of balloon payments, are not disclosed to the seller.

6. The only entity liable for the carryback debt is a corporate entity.

7. There are no details about the type of improvements that will be constructed and no method by which the progress and quality of construction can be monitored by the seller.

The presence of any of these items should raise concern in any agreement that requires the seller to subordinate to a new loan. When these factors are present, the seller should not proceed with the deal until after the entire transaction has been reviewed by competent legal counsel.

William A. Kozub is an attorney with the law firm of Stoops & Kloberdanz, PLC, where he practices in the areas of real es - tate and commercial law, with an emphasis on real estate transactions, lender liability and securities fraud. Mr. Kozub is admitted to practice in Arizona and California, and he may be reached at (602) 2747700.

Seven ways to reduce broker liability

Reprinted from the AgentNews *Web site, www.agentnews.com, with permission.*

By Peter G. Miller

Given that real estate transactions are getting more complex, it is not surprising that few deals are perfect or that some are downright traumatic. So who gets blamed when the faucet leaks, the hot water heater fails, or a tree dies? Who is responsible when "buyer's remorse" sets in and a conversation held months before suddenly seems less clear?

Too often realty brokers are blamed when transactions are less than perfect, a situation brokers can avoid or mitigate by taking seven basic steps according to Phoenix defense attorney Robert N. Bass.

Bass, a former administrative law judge for the Arizona Department of Real Estate, offers claims-reduction counseling for brokers and defends those who wind up in court or with license complaints. In many instances, says Bass, suits arise because brokers have failed to protect their own interests or those of their clients.

"It doesn't matter that you've been in business for 20 years and have a great consumer track record," says Bass. "It only takes one disgruntled client to sue or to file a complaint against your license -- your right to earn a living." Bass suggests these baseline strategies to reduce claims.

1. Communicate & Follow-Up

Document your disclosures, discussions and any choices the client makes against your advice. Send confirming letters. Brokers should ask: "What if they deny I told them this important fact?" You need to have a record of what was said, and when.

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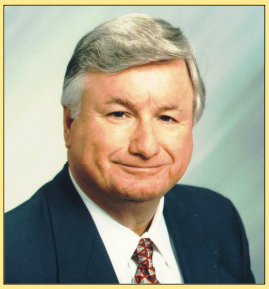

Jerry Holt

News From The Commissioner

Five-year Rules Review

Every five years, the Department is required to review the Commissioner's Rules to identify those which are no longer applicable, those superseded by statutes and other rules which, for one reason or another, just don't work. This rules review process also enables the department to reword poorly written rules which contain ambiguous language, and to propose new rules which might be made necessary by new legislation or the need to clarify the intent of existing legislation.

The Department's 1998 Proposed Rules Package is summarized beginning on page 1, and represents a tremendous amount of work by Department staff members. The complete text of the proposed changes may be found on our Web site at www.adre.org, or can be inspected at the Department's Phoenix or Tucson office.

Most of the changes in the package repeal rules which have been superseded by statutes, rules which really are not necessary because the statutes don't need interpretation, or rules which must be amended to reflect recent changes in the related statute.

The remainder of the changes clarify existing rules or create new rules to address new legislation. A good example is Commissioner's Rule A.A.C. R4-28-103 which addresses the Commissioner's authority to require applicants for Department licenses to be fingerprinted. But A.R.S. § 32-2108.01 sets out the requirements for fingerprinting in far more detail.

It is proposed that R4-28-103 be totally rewritten to address licensing time-frames. Legislation passed in 1996 (Laws 1996, Ch. 102, § 42), requires agencies to adopt rules establishing time-frames for the granting or denial of licenses. A.R.S. § 41-1001(11) defines a "license" as the whole or part of any agency permit, certificate, approval, registration, charter or similar form of permission required by law. The l996 legislation amended A.R.S. § 41-1073 to require the Department, and other agencies, to have in place no later than December 31, 1998, a rule establishing "an overall time frame during which the agency will either grant or deny each type of license it issues." You may read a summary of exactly how we plan to implement this requirement on page 10.

Potential Regulatory Reform Problem

The Departmentinspects all subdivisions to ensure that representations made by the developer in the application for a public report are fulfilled. As an example, a developer might state that sidewalks will be installed in a certain subdivision by a certain date. A new section of the Administrative Procedures Act, A.R.S. § 41-1009 grants the developer the right to have a representative present at the inspection site. In this example, the presence of the representative is not really necessary; the sidewalks are either there or they are not. The developer would probably rather not have to appear at the subdivision during the inspection.

You can see the logistics problem. Because our subdivision representatives are typically scheduling several inspections in any given day, it's difficult to predict the exact time of day at which the inspector will arrive, and the inspection would have to be made on a day and time when the developer's representative and the inspector could both be present. The bottom line is that this process has the potential to impose a lot of red tape and to delay inspections and issuance of public reports.

The Department has asked the Attorney General's Office for an informal opinion as to whether the developers may waive the right to be present during subdivision inspections. Depending on the Attorney General's opinion, it may or may not cause a logistic slowdown. Time will tell.

News to Applaud

According to Homebuilders Marketing, Inc., a private research company, in the metro Phoenix area, 27,076 new home and 57,373 used home transactions closed escrow in 1997. Statewide, there were 114 fair housing complaints filed with the Attorney General's Office.

This means that just over one-tenth of one percent of closings resulted in a fair-housing complaint. Most fair-housing violations occur when homes are being shown. If you assume that it takes 10 showings to produce a sale, only 0.0135 percent of showings resulted in a complaint. This certainly lends support to our proposal to change Commissioner's Rule R4-28-401(G) to eliminate mandatory fair-housing continuing education. And it tells me you are all doing a great job in complying with the Arizona Fair Housing Act.

My compliments to all licensees and our continuing education instructors.

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2. Explain Financing Terms

Consumers need to understand financing language and what it means in terms of costs and liability. Have clients sit down with lenders to review loan options in detail.

3. Avoid Contract Language Errors

Make contract language clear and simple, know your rights and limitations to alter contracts under the rules in your state, and work with an attorney to perfect contract language.

4. Handle escrow funds with care

As Bass tells brokers, "The money in your trust account is tainted money...'TAINT YOURS!'" Place buyer deposits in an escrow account. Do not touch them. Do not assume a closing will occur. Do not withdraw a penny without written authorization. If there is a dispute between buyer and seller, turn the money over to a court or, in some jurisdictions, a real estate commission.

5. Be careful with measurements

There is no standard way to measure the size of a home. Be sure to include a written disclaimer stating that all measurements are approximate, and that if any measure is important, the buyers will measure it for themselves. If someone wants to know about lot lines, easements or possible encroachments, recommend a survey in writing and warn clients what can happen if they ignore your advice.

6. Never let a transaction close without a home inspection.

If buyers refuse, make them sign a release acknowledging that they were advised to obtain a home inspection, but they declined, are acting against your advice, are responsible for everything a professional inspection would have revealed, and that they release you from all liability for the condition of the property.

7. Work with an attorney before problems arise.

"It's cheaper and easier to act defensively than to face litigation," says Bass. "It's also a marketplace necessity. After all, professionalism and risk reduction go hand in hand."

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1998 Schedule of Broker Audit Clinics

A.R.S. § 32-2136 requires all newly licensed real estate brokers to attend a Broker Audit Clinic presented by the Department within 90 days of issuance of their original broker's license. *Effective July 21, 1997, all designated real estate brokers must also attend a Broker Audit Clinic within 90 days after becoming a designated broker unless the broker has attended an audit clinic during the broker's current licensing period.* All designated brokers shall attend a broker audit clinic once during every four-year period after their initial attendance.

Seating is limited and reservations are required. To make a reservation for a Phoenix clinic, call the Department's Customer Services Division at (602) 468-1414, extension 100. In Tucson, call (520) 628-6940. Those who fail to make reservations will be turned away if seating is not available. Brokers who attend will receive three hours of continuing education credit in the category of Commissioner's Rules.

The following is the schedule of Clinics to be offered in Phoenix and Tucson during the remainder of 1998. Additional clinics may be scheduled from time to time at other locations in Phoenix and in rural areas.

PHOENIX	TUCSON
Industrial Commission Auditorium	State Office Building
800 W. Washington	400 W. Congress
	Room 158
Noon - 3 p.m.	**8:30 a.m. - 11:30 a.m.**
August 21	August 20
September 18	September 17
October 23	October 22
November 20	November 19
December 18	December 17

The mission of the
Arizona Department of Real Estate
is to safeguard and promote the public interest
through timely and capable assistance,
fair and balanced regulation,
and sound and effective education.

ADMINISTRATIVE ACTIONS

REVOCATIONS

H-1936
David F. Sturgeon
Mesa

DATE OF ORDER: June 11, 1998

FINDINGS OF FACT: Respondent was originally issued a real estate salesperson's license in January 1988. At the time of this order, he was employed as a real estate salesperson by West USA Realty.

In July 1995, Respondent approached property owner Percy York to list York's property in Mesa. Respondent promised York that if he could not sell the property within a certain time period, Respondent would purchase the property.

York had purchased the home through a wraparound mortgage on a VA loan. Pursuant to the terms of the loan, the property could not be transferred again without triggering a due-on-sale clause. The load was not assumable without approval of the Department of Veterans Affairs.

Respondent eventually purchased the property. A check in the amount of $10,000 was given to York from Roy L. Carpenter, a minister and a friend of Respondent. Carpenter and York entered into an Agreement to Sell Real Property (the "first agreement"). Pursuant to the first agreement, Carpenter paid the $10,000 as a down payment and assumed the existing mortgage which had an unpaid balance of $70,000. The $10,00 came from Respondent.

Respondent verbally agreed to make the $570 monthly mortgage payment except for two months when York's girlfriend lived at the property.

On August 28, 1995, upon receipt of the $10,000, York signed a quitclaim deed with no named grantee. Respondent notarized the deed, and testified that this arrangement was irregular but York needed to leave town immediately for health reasons.

Respondent subsequently placed a West USA Realty sign on the property and began advertising it for sale. He did so without signing a listing agreement and without the knowledge of his broker. In August 1995, Herbert and Sherry Thayer answered a newspaper ad placed by Respondent for the sale of the property. Respondent admitted that he "was acting for the Thayers as a real estate agent."

On August 28, 1995, the Thayers signed an Agreement to Sell Real Property (the "second agreement") and paid a $14,000 deposit and down payment on the property. Mr. Thayer testified that none of the blanks in the second agreement were filled in. He further testified that the seller's signature line was blank. He also testified that the handwritten phrase "no real estate agent involved" on line 16 of the second agreement was inserted after he signed the document.

Thayer testified that he thought York was the owner and seller of the property, and that he did not know that Respondent was the real owner and seller. Thayer testified that he thought Respondent was his real estate agent.

Respondent completed the quitclaim deed by inserting the Thayer's names in the empty blank.

Thayer testified that Respondent told him he was purchasing the property with an assumable, non-qualifying loan. He further testified that Respondent told him he would not need title insurance, and that when Thayer asked Respondent if he should retain an attorney, Respondent replied that an attorney was not necessary.

The transfer of the property was a violation of the terms of the existing VA mortgage. Respondent failed to obtain an agreement signed by the buyer and seller disclosing the nature of the loan. Mr. Thayer testified that he was never told that there was a VA mortgage on the property. Respondent testified that he disclosed this information to the Thayers.

After the purchase, the Thayers made their mortgage payments to United Title Company. They thought this was their mortgage company. The Thayers subsequently received a $126.98 monthly increase (for "forced Insurance") in their mortgage payment. The Thayers contacted United Title Company to change insurance carriers. The Thayers eventually learned that Charter Bank for Savings (the "Charter Bank") was the actual mortgagee for the property.

When the Thayers contacted Charter Bank, they were informed that the property was never sold to York, but that Robert Fletcher and Karen Hill were the mortgagors on the property. Charter Bank told Mr. Thayer they had never heard of York, Carpenter or the Thayers.

Further, Charter Bank informed Mr. Thayer that the sale of the property to York and the subsequent sale to the Thayers may have triggered the VA loan's due-on-sale clause. Mr. Thayer testified that he feared he would lose the property, his $14,000 down payment and $35,000 he had spent improving the property.

The Thayers subsequently learned they would have to qualify to assume the VA loan. After several months of filling out applications, the Thayers were able to assume the loan.

Respondent testified that he made several mistakes in this transaction. He said he circumvented the legal forms, rules and policies at West USA Realty because he was trying to help two parties who were in desperate situations. York, he said, needed to sell the property quickly because of heath reasons, and the Thayers needed a non-qualifying assumable loan because they had credit problems. He testified that he has a reputation for finding creative solutions to difficult situations.

Respondent testified that he filed bankruptcy on August 4, 1995, and that he purposely misled the Thayers into thinking that Carpenter or York was the real owner of the property. Because he was facing bankruptcy, he testified, he concealed his ownership in the property and had Carpenter collect and deposit the Thayers' $14,000 down payment in Carpenter's account.

VIOLATIONS: Respondent violated Arizona Revised Statutes, Title 32, Chapter 20, within the meaning of A.R.S. § 32-2153(A)(3). Respondent breached his fiduciary duty to the Thayers and intentionally failed to deal fairly with the Thayers, in violation of A.A.C. R4-28-1101(A). Respondent failed to disclose information materially affecting the consideration paid by the Thayers, in violation of A.A.C. R4-28-1101(B). Respondent acted as a principal in the sale of the property without properly notifying the Thayers that he had a real estate license and was acting as a principal, in violation of A.A.C. R4-28-1101(E). Respondent engaged in substantial misrepresentations or a course of misrepresentation within the meaning of A.R.S. § 32-2153(A)(1) and (B)(3). Respondent placed a sign on the property without written authority from York in violation of A.R.S. § 32-2153(A)(22). Respondent failed to maintain a complete record of the sales transaction, in violation of A.R.S. § 32-2153(A)(18). Respondent was negligent in not thoroughly investigating and disclosing the complexities associated with VA loans and agreements for sale, in violation of A.R.S. § 32-2153(A)(22). Respondent has not shown he is a person of honesty, truthfulness and good character within the meaning of A.R.S. § 32-2153(B)(7). Respondent has violated state laws, regulations and rules involving theft, substantial misrepresentations and dishonest dealings within the meaning of A.R.S. § 32-2153(B)(10).

In his Final Order, the Commissioner stated: "By acting as the real estate agent for the Thayers, the standards of the real estate profession required the Respondent

to make their interest paramount. By also acting as the undisclosed principal in the sale, the Respondent took advantage of an opportunity to serve his own interests. The facts demonstrate that no only did the Respondent place his own interests above those of his clients, he actively took steps to keep his clients from learning the truth. This conduct strikes at the heart of acceptable real estate practice…and demands the most serious consequences.
DISPOSITION: Sturgeon's real estate salesperson's license is revoked. Sturgeon to pay a civil penalty in the amount of $3,000.

SUSPENSIONS

H-1912
Daniel B. Modeen
Yuma
DATE OF ORDER: April 27, 1998
FINDINGS OF FACT: Respondent was originally issued a real estate salesperson's license in April 1982. That license expired April 30, 1998 but Respondent submitted a timely renewall application which was pending disposition of this matter.

On February 14, 1996, Clarence and Peggy Abrams entered into a Residential Resale Real Estate Purchase Contract to buy a manufactured home and lot in Yuma. Bill and Faith Orebaugh were the sellers.

Respondent represented the Orebaughs in the sale of the home, and the contract designates Respondent as the agent for the orebaughs exclusively. However, the escrow information listed Respondent as both the listing agent and selling agent.

Respondent hired Roy Vaughan of Conquest Pest & Termite Control to inspect the home for termites. Respondent testified that Vaughan had inspected "at least 30 to 35 homes" over a 14-year period for Respondent prior to inspecting the subject property. Pursuant to the terms of the contracts, the Abrams' had the right to hire an independent inspector, but the Abrams' testified that they relied on Respondent to arrange for the inspection.

On February 19, Vaughan inspected the home. In his report he stated that "visible evidence of wood destroying organisms was observed. No control measures were performed. Evidence and organisms were observed: Termites under mobile form board left under mobile."

Respondent testified that Vaughan told him there was a termite problem with the form boards under the home, and that he interpreted the words "form boards" to mean wood that was lying under the mobile home. Respondent testified that he told Vaughan to take care of the problem, and assumed that Vaughan or the Abrams' would remove the invested form boards. He further testified that Vaughan said he would speak to the Abrams' about the termite problem.

On February 23, Vaughan returned to treat the termite problem. In his second report, he stated that "visible evidence of infestation was noted; proper control measures were performed." He also stated he was "unable to inspect floor or wall covering" because these areas of the home were inaccessible.

Prior to closing, the Abrams' met with Respondent. Mr. Abrams testified that he did not recall whether he ever reviewed the first report, but that he did review and sign the second report prior to closing. He testified that he also interpreted "form boards" to mean wood lying under the mobile home. However, Mr. Abrams testified that he is not an expert on termites. When he asked Respondent if there was any problem with termites "in the home," Respondent replied that there was "no sign" of any termite problem "in the home," and that the home "passed the inspection."

The sale closed escrow on February 29. Shortly after moving into the home, the Abrams' moved to Las Vegas, Nevada, for two weeks for health reasons. When they returned in April or May, termite infestation was clearly visible throughout the home.

In May, Mr. Abrams contacted Truly Nolen Exterminating to treat the problem. Truly Nolen refused to treat the home until an infested retaining wall was removed. Although the record is not entirely clear on this issue, the "form boards" apparently included the retaining wall and other wood that supported the home. Mr. Abrams testified that he cannot remove the remaining form boards without the home caving in.

Prior to the closing, the Orebaughs were required to fill out a Residential Seller's Property Disclosure Statement (SPDS). The Abrams' testified that they requested the SPDS from Respondent prior to closing but did not receive it.

Respondent testified that he filled out the SPDS and forged the Orebaugh's and the Abrams' signatures. He said he completed and signed the SPDS because he wanted to close the sale quickly. He said he "spaced out" when he forged the names. He testified that the SPDS was "not a serious document to me" and was "irrelevant."

Respondent testified that when he spoke to the Orebaughs about the home, the issue of termites "never came up." Despite having insufficient information from sellers regarding possible termite problems, Respondent completed the SPDS and forged the signatures of the Abrams' and Orebaughs. Respondent testified he had a duty to the Abrams' to correct the termite problem but had no duty to inform the Abrams' of the problem.

The purchase price of the home was approximately $55,000. The contract stated that the seller agreed to pay up to 1 percent of the purchase price for costs of treatment of infestation. If the cost of treatment exceeded 1 percent, the seller or the buyer could terminate the contract. The Administrative Law Judge observed that he could not overlook the fact that $550 was paid for the only termite treatment for the home, exactly 1 percent of the purchase price. "If the home would have required more treatment, then the seller or the buyer could have terminated the contract. In short, further termite treatment could have killed the deal. This certainly would provide the incentive to not disclose the termite problems with the home," he wrote.
VIOLATIONS: Respondent violated provisions of Arizona Revised Statutes, Title 32, Chapter 20, within the meaning of A.R.S. § 32-2153(A)(3). Respondent failed to deal fairly with all parties to the contract in violation of A.A.C. R4-28-1101(A). Respondent did not reasonably determine the extent of the termite problem in violation of A.R.S. § 32-2153(A)(22). Respondent forged the signatures of the Orebaughs' and the Abrams' in violation of A.R.S. § 32-2153(A)(25). Respondent engaged in substantial misrepresentations or a course of misrepresentation within the meaning of A.R.S. § 32-2153(A)(1) and (B)(3). Respondent has not shown he is a person of honesty, truthfulness and good character within the meaning of A.R.S. § 32-2153(B)(7). Respondent violated state laws, regulations and rules involving theft, substantial misrepresentations and dishonest dealings within the meaning of A.R.S. § 32-2153(B)(10).
DISPOSITION: Respondent's real estate salesperson's license is renewed, but is suspended for a period of six months beginning June 11, 1998. Respondent to pay a civil penalty in the amount of $2,000.

CONSENT ORDERS

H-1955
Paul E. Little and APL Properties, LLC
Tucson
DATE OF ORDER: MAY 14, 1998
FINDINGS OF FACT: Paul E. Little was issued an original real estate broker's license in June 1968. His license expired March 31, 1998. At all times material to this matter, he was the designated broker of APL Properties, a corporation licensed as a real estate broker.

APL Properties was issued an original corporate real estate broker's licensee in September 1994. That license expires on

September 30, 1998.

On April 20, 1998, Little submitted an application for renewal of his license, disclosing that he and APL continued to operate as a brokerage after his license had expired.

Little disclosed that while his license was expired he negotiated one purchase contract representing the Deans, buyers under a buyer-broker agreement. Also during the unlicensed period, APL:

a. Continued managing approximately seven properties under existing property management agreements.

b. Received a $4,500 commission in the Dean transaction.

c. Received $305 in property management fees.

Little attests that he did not receive, and does not anticipate receiving, a commission split from APL's activities described above, and that upon discovering his license had expired offered, in writing, to return the commission to the Deans.

VIOLATIONS: Little engaged in activities for which a current real estate license is required while not properly licensed to do so, in violation of A.R.S. § 32-2153(B)(6). He continued to act as a real estate broker after his license expired and while his rights to act as such were terminated, in violation of A.R.S. § 32-2130(B). He failed to pay the Commissioner the biennial renewal fee promptly and before the time specified, in violation of A.R.S. § 32-2153(A)(14).

APL continued real estate activities without a current designated broker, in violation of A.R.S. § 32-2122(B). APL received compensation through the efforts of its designated broker while his license was expired, in violation of A.R.S. §§ 32-2153(A)(10) and 32-2155(A) and (B).

Little and APL violation provisions of Arizona Revised Statutes, Title 32, Chapter 20, within the meaning of A.R.S. § 32-2153(A)(3).

DISPOSITION: Little and APL, jointly and severally, shall pay a civil penalty in the amount of $500.

Little shall take six hours of approved real estate continuing education, in addition to hours required for license renewal, as directed by the Department.

Little shall send a copy of this Consent Order to the Deans by certified mail.

APL shall have ratified, or shall release the property management agreements executed during the unlicensed period. APL's current designated broker shall review and initial leases written during the unlicensed period.

The renewal of Little's real estate broker's license is granted, and the license may be returned to active status upon submission of the applicable forms and fees.

H-1956
Clayton Properties, Inc., Beverly Clayton and John P. Rizk
Scottsdale

DATE OF ORDER: MAY 18, 1998

FINDINGS OF FACT: Rizk was issued an original real estate broker's license in February 1996. His license expired February 28, 1998. At all times material to this matter he was employed as a broker by Clayton Properties, Inc., a corporation licensed as a real estate broker.

Beverly Clayton was appointed designated broker of Clayton Properties in June 1993. As designated broker of Clayton Properties, she is responsible to ensure that salespersons and associate brokers employed by Clayton Properties are currently and actively licensed to the corporation.

Between March 1, 1998 through April 9, 1998, Rizk provided real estate services for which a license is required without being properly licensed to do so.

At the time he submitted his renewal application, he disclosed he wrote one purchase contract on behalf of Clayton Properties and executed two listing agreements. One transaction has closed escrow but Rizk has not yet been paid the commission.

Rizk states that his failure to renew his license was due to not receiving a renewal from the Department, and his assumption that his license expired in October 1998.

Clayton states she assumed Rizk would renew his license in a timely manner.

VIOLATIONS: Rizk engaged in business requiring a real estate license without being licensed to do so in violation of A.R.S. § 32-2153(B)(6).

He received or anticipates receiving compensation for activities conducted while his license was expired, in violation of A.R.S. §§ 32-2153(A)(10) and 32-2155(A). He failed to pay the Commissioner the biennial renewal fee promptly and before the time specified, in violation of A.R.S. § 32-2153(A)(14).

Clayton Properties employed and paid, or anticipates paying, compensation to a broker whose license had expired, in violation of A.R.S. §§ 32-2153(A)(6), 3202153(A)(10) and 32-2155(A).

Clayton, as designated broker for Clayton Properties, failed to exercise reasonable supervision over the activities of Rizk in violation of A.R.S. § 32-2153(A)(21). By allowing Rizk to continue to represent Clayton Properties after his license expired, Clayton demonstrated negligence in performing an act for which a license is required, in violation of A.R.S. § 32-2153(A)(22).

Clayton and Rizk disregarded or violated the provisions of Arizona Revised Statutes, Title 32, Chapter 20, within the meaning of A.R.S. § 32-2153(A)(3).

DISPOSITION: Rizk's renewal is granted and he may return to active status upon submission of applicable forms and fees.

Rizk and Clayton, jointly and severally, are assessed a civil penalty of $500. They shall each take six hours of approved real estate continuing education, in addition to hours required for license renewal, as directed by the Department.

Clayton Properties and Rizk shall offer to refund the commission earned by Rizk while his license was expired.

Clayton Properties shall remake or have ratified by the property owner each listing agreement executed during the unlicensed period, or shall release the owner from the agreement.

H-1957
Elliott Homes of Arizona, Inc., Allie C. Evenson, and Linda Lou Woodard
Tempe and Scottsdale

DATE OF ORDER: May 27, 1998

FINDINGS OF FACT: Woodard was issued an original real estate salesperson's license in December 1995. That license expired December 31, 1997. At all times material to this matter, Woodard was employed as a salesperson by Elliott Homes of Arizona, a corporation licensed as a real estate broker.

Evenson was appointed designated broker of Elliott Homes in March 1996. As designated broker, he is responsible to ensure that salespersons and associate brokers employed by Elliott Homes are currently and actively licensed to the corporation.

Between January 1, 1998 through May 7, 1998, Woodard provided real estate services for which a license is required without being properly licensed to do so. Woodard submitted a late renewal application on May 7, 1998, which is pending disposition of this matter.

At the time she submitted her renewal application, Woodard disclosed she wrote 22 purchase contracts on behalf of Elliott Homes during the unlicensed period. She stated that her failure to timely renew her license was due to her assuming that the broker would file her renewal application. Evenson states that the oversight of Woodard's license renewal was due, in part, to not receiving a renewal form from the Department.

VIOLATIONS: Woodard engaged in business requiring a real estate license while not properly licensed to do so, in violation of A.R.S. §§ 32-2130(B) and 32-2153(B)(6). Woodard received or anticipates receiving compensation for activities conducted while

her license was expired, in violation of A.R.S. § 32-2153(A)(10). She failed to pay the Commissioner the biennial renewal fee promptly and before the time specified, in violation of A.R.S. § 32-2153(A)(14). By continuing to conduct activities requiring a license after her license expired, she demonstrated negligence in performing an act for which a license is required, in violation of A.R.S. § 32-2153(A)(22). Woodard disregarded or violated the provisions of Arizona Revised Statutes, Title 32, Chapter 20, within the meaning of A.R.S. § 32-2153(A)(3).

Elliott Homes and Evenson employed and paid, or anticipate paying, compensation to a salesperson whose license had expired, in violation of A.R.S. §§ 32-2153(A)(6), 32-2153(A)(10) and 32-2155(A). By allowing Woodard to continue to represent Elliott Homes after her license expired, Evenson and Elliott Homes demonstrated negligence in performing acts for which a license is required, in violation of A.R.S. § 32-2153(A)(22).

DISPOSITION: Woodard's renewal is granted and she may return to active status upon submission of applicable forms and fees. Woodard is assessed a civil penalty in the amount of $500.

Elliott Homes and Evenson, jointly and severally, are assessed a civil penalty in the amount of $500.

Woodard and Evenson shall each take three hours of approved real estate continuing education, in addition to hours required for license renewal, as directed by the Department.

Evenson, as designated broker of Elliott Homes, shall develop, document and implement in-house procedures for the office to use to track license expiration dates and to prevent a recurrence of the violations cited herein.

H-1958
Rancho Mañana Ventures, L.L.C., dba The Casitas at Rancho Mañana
Cave Creek

DATE OF ORDER: June 17, 1998

FINDINGS OF FACT: Rancho Mañana Ventures filed an application with the Department for a final time-share public report on December 17, 1997. On January 26, 1998, the Department advised the attorney for Rancho Mañana Ventures, Vernon Watters, that a recorded plat map and recorded Declaration of CC&Rs must be submitted before the Department could further review Rancho Mañan a Ventures' application for a public report.

On March 11, 1998, the Department received information that Rancho Mañana Ventures was marketing the time-share intervals at The Casitas at Rancho Mañana. On March 20, 1998, the Department received written confirmation from Watters that Rancho Mañana Ventures had ceased all marketing activities as of March 13, 1998.

On April 22, 1998, the Department received information that Rancho Mañana Ventures was continuing to market time-share intervals at The Casitas at Rancho Mañana.

On May 3, 1998, a representative from the Department visited the sales office at The Casitas at Rancho Mañana where he observed an informal sales presentation and was given a package of promotional material. Additionally, the representative observed a poster in the Tonto Bar & Grill, a part of the Casa Mañana Golf Course located across the parking lot from the sales office, advertising time-share intervals for sale at The Casitas at Rancho Mañana.

Rancho Mañana Ventures submitted the recorded plat map and Declaration of CC&Rs to the Department on May 4, 1998.

No public report nor exemption had been issued or granted to Rancho Mañana Ventures for the Casitas at Rancho Mañana.

VIOLATIONS: Rancho Mañana Ventures offered for sale in Arizona time-share intervals at The Casitas at Rancho Mañana without first obtaining a time-share public report, in violation of A.R.S. § 32-2197.01.

Rancho Mañana Ventures used promotional and advertising material in connection with the sale of time-share intervals at The Casitas at Rancho Mañana that had not been approved by the Commissioner in violation of A.R.S. § 32-2197.11(A).

DISPOSITION: Rancho Mañana Ventures is assessed a civil penalty in the amount of $3,000. Respondent shall comply with all statutory requirements relating to the offer of time-share intervals for sale, lease or use. The department shall issue a time-share public report to Rancho Mañana Ventures for The Casitas at Rancho Mañana.

Sale of 12 or more time-share intervals requires public report, but you may qualify for exemption

By John Gerard

According to A.R.S. § 32-2197.01, a time-share public report must be obtained before offering for sale, lease or use 12 or more time-share intervals in any particular time-share project.

This poses a time-consuming and expensive problem for time-share developers who acquire interval weeks in projects other than their own with no intention of reselling the weeks to individual buyers. The financial burden of maintenance fees, taxes, special assessments and association dues generally influence the developer to sell their unwanted inventory as quickly as possible.

Time-share Interval Owners Associations may also find that they hold title to 12 or more interval weeks as a result of forfeiture or foreclosure proceedings against owners who fail to pay association dues, and a finance company may have accumulated 12 or more intervals due to foreclosure on intervals on which it was a creditor.

The special order of exemption process can, in most cases, facilitate the bulk sale of unwanted inventory. Under the provisions of A.R.S. 32-2197.13, a petition for special order of exemption may be filed with the Department.

The petitioner must demonstrate to the Department's satisfaction that issuance of a public report is not essential to the public interest or for the protection of the buyers. Further criteria to obtain a bulk sale exemption includes:

1. The sale must be a bulk sale of twelve or more interval weeks to one buyer in one transaction.
2. The petitioner must provide written proof that the buyer has obtained or agrees to obtain a current public report prior to offering the interval weeks for sale.
3. The petition must be accompanied by a (nonrefundable) fee of $300.

It is important to note that each bulk sale exemption request is reviewed on a case-by-case basis. Concerns and requirements of the Department leading to issuance or denial of the exemption may vary. You may save a great deal of time and effort if, prior to submitting an exemption request, you contact the Subdivision Division and consult a representative familiar with the bulk sale exemption process for time-shares.

The Division's telephone number is 602/468-1414, extension 400.

Mr. Gerard is a Department of Real Estate Subdivision Representative

Hearings set to review proposed rule changes

Continued from page 1

titious names" and "d.b.a." names. These definitions were so intertwined that it became confusing to remember which one was registered with the county or which one was registered with the Office of the Secretary of State. The Department defines "fictitious" to broadly encompass all three terms when dealing with a name other than a person's legal name since it deals with all three in essentially the same manner.

R4-28-102 Document Filing; Computation of Time

This Section clearly explains the necessary standard for the delivery to, and receipt by, the Department for correspondence, forms, legal filings and other documents. It clarifies when a document is considered filed and gives criteria for calculating time periods. It also allows for use of the "postmark date" for determining the timeliness of filings for original or renewal licensure received by the Department.

R4-28-103 Licensing Time-Frames

Laws 1996, Ch. 102, § 42, requires agencies to adopt rules establishing time-frames for the granting or denial of licenses. A.R.S. § 41-1001(11) defines a "license" as the whole or part of any agency permit, certificate, approval, registration, charter or similar form of permission required by law, but it does not include a license required solely for revenue purposes. The rules must specify:

1. An "administrative completeness time-frame" (the time it takes the agency to determine if an application is complete);
2. A "substantive review time-frame" (the time it takes the agency to review the application and determine if the applicant meets the substantive criteria for licensure); and
3. An "overall time-frame" (a combination of the administrative completeness and substantive review time-frames.)

The law also requires an agency to notify applicants within the established time-frame whether the application is complete (administrative completeness) and whether a license or certification is being issued (substantive review).

The Department researched all licenses, certifications, approvals, permits and registrations to determine what constituted a "license" as contemplated by A.R.S. § 41-1073. R4-28-103 contains the final listing of those licenses that fall under the requirements of the new law.

According to legislation, time-frames are required only for licenses that require an application for processing. A.R.S. § 41-1073 prescribes that . . . [n]o later than December 31, 1998, an agency that issues licenses shall have in place final rules establishing an overall time-frame during which the agency will either grant or deny each type of license that it issues. The definition of "overall time- frame" is the number of days after receipt of an application for a license during which an agency determines whether to grant or deny a license. Determining whether a license required an application, or whether a license is summarily issued upon request is the basis for whether the Department is required to develop time-frames. The Department does issue licenses based upon review of an application, and under § 41-1073 has developed time-frames.

The term "application" is not defined in the administrative procedures statutes. However, an application is generally a written request in which the information provided is used in determining if the applicant meets the necessary qualifications for a license. This also has served as a guide when reviewing the licenses that require an application.

The language of A.R.S. §41-1073(C) was carefully considered in reviewing and establishing the time-frames in R4-28-103. In particular, the potential impact of delay on the regulated community is weighed against the resources of the agency. It is extremely rare that the fully allotted time-frames will be used, particularly in cases when the administrative completeness review is all that is necessary.

The Department has not included a time-frame for a prelicensure education waiver or a continuing education waiver. These waivers are authorized by statute and although they both require the submission of a letter and supporting documentation to determine if the applicant meets the necessary qualifications for the waiver, the waivers are not required by law but are an option. Rejection of the request does not mean that the applicant is denied a real estate license or license renewal, it simply means that the applicant cannot take a "short-cut" in the licensing or renewal procedure.

The special order of exemption is not included for the same reason. If the petitioner for an exemption does not meet the qualifications for the exemption, the petitioner cannot avoid the "license procedures" but instead must apply for a public report pursuant to the statutory requirements.

The "expedited registration" for a development is not included as the time-frame is already established within A.R.S. § 32-2184.01(B).

A licensee is required to obtain approval before advertising any subdivision, unsubdivided land, timeshare or membership campgrounds. The licensee does not provide an application, nor is the licensee prohibited from advertising if all the advertising requirements are met. No time-frames are included for these approvals.

R4-28-104 Fees

All license fees specified in statute have been transferred to this Section including the fees from R4-28-301(I). This Section also establishes specific fees when the statute provides for a range of permissible fees.

Salesperson and Broker renewal fees reflect the recommendations of the Advisory Board and the Arizona Association of Realtors® (AAR) by requiring a graduated renewal fee for late renewals. A.R.S. § 32-2132 places caps of $250 for broker renewal and $150 for salesperson renewal. The total graduated renewal fees schedule fall within these caps.

R4-28-301 General License Requirements

This Section removes any information duplicated in A.R.S. §§ 32-2123 and 32-2130(A) and establishes a clear process for license application. It moves specific requirements to new Sections dealing with the appropriate topics, such as branch office licenses (R4-28-304) and fees (R4-28-104).

Subsection (A). Stakeholders suggested that the phrase "any person exercising control" be included in the rule to mean those people being responsible to submit licensing information. The Department considered this meaning too broad. This phrase would pose an unfair burden on the licensee to provide this information from these unspecified persons, and on the Department to administer enforcement while not having specific knowledge of persons or entities.

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Subsection (B). Although stakeholders wish to limit disclosure to only final actions, the Department feels strongly it is necessary to be apprised of all formal charges pending, or when a judgment or sentence has been deferred.

The restriction for a professional corporation and a professional limited liability company to adopt a fictitious name has been moved to R4-28-1001(C).

R4-28-302 Employing and Designated Broker's License; Nonresident Broker

The amended R4-28-301 now establishes a clear process for licensure. Specific information currently required on a broker's application has been listed so that the applicant knows what is required. Information necessary for a partnership, corporation, limited liability company, foreign entity, self-employed broker, or nonresident broker has been placed into separate categories so the applicant can find the information easily.

A.R.S. § 25-320(L) requires a licensee or certificate holder to provide a social security number to licensing agencies. Although a broker manages the partnership and holds his/her own broker's license, the partnership holds the partnership license and, as such, each partner is being required to provide their social security number.

Subsection (J). After discussion with industry, this provision was amended to consider a change of designated broker timely if the required documents were submitted the same day or by the next business day. This timely submission would ensure that a licensed entity is not "out-of-business" for the weekend if its designated broker resigns on a Friday afternoon. The entity can locate a new designated broker, complete the paperwork, and submit it to the Department on the following Monday without having to temporarily close its offices and sever all its licensed employees.

R4-28-303 License Renewal; Reinstatement; License Changes

As in the previous two Sections, this rule establishes a clear process for license renewal, reinstatement and license changes. License changes have been grouped into three categories: those changes requiring written notification, changes requiring a completed change form, and changes which must be preapproved before implementing.

R4-28-304. Branch Office; Branch Office Manager.

This Section consolidates all the requirements concerning a branch office and its manager into one location. It specifies the information required on the application and establishes the permissible responsibilities of the branch office manager.

R4-28-305 Temporary License; Certificate of Convenience

This Section specifies the information necessary for the temporary broker's and cemetery salesperson's license or certificate of convenience applicant as authorized under A.R.S. §§ 32-2133, 32-2134 and 32-2134.01.

R4-28-401 Prelicensure Education Requirements; Waiver

The language in subsection (A) was replaced by 1989 and 1993 amendments to A.R.S. § 32-2124(B) and (C), by Laws 1989, Chapter 230 (S.B. 1054), effective April 1, 1990, and Laws 1993, Chapter 140 (S.B. 1250), effective April 20, 1993. Subsection (A) has been stricken.

This Section explains how to qualify for a prelicensure waiver, describes how the waiver will be granted or denied, and identifies what information is required in a request for a waiver of the pre-license requirements. The rule also places a limit on the daily prelicensure credits the Department will recognize.

R4-28-401.01 Continuing Education Requirements; Waiver

An education review committee recommended reducing the number of continuing education hours in the mandated renewal topics from 18 hours to 12 hours, although the total number of required hours for renewal (24) is unchanged. The committee determined that by eliminating 2 of the previous 6 categories a licensee would be encouraged to take courses that were relevant to an area of specialization, thus eliminating the need to take classes that are not applicable to a particular specialty.

This Section contains information found currently in R4-28-401 and removes the mandatory fair housing and environmental law categories.

In the past, the Department received written protests to the categories of fair housing and environmental as required courses. Business brokers and commercial licensees complained that fair housing did not apply to them. A committee of stakeholders appointed to study the issue concluded that 'fair housing' and 'environmental law' were not necessary categories for mandating a minimum of 3 renewal credit hours. The committee concluded that licensees should have more flexibility in selecting classes applicable to their specific field, which could occur if the number of mandated topics were reduced and the number of elective hours increased. Although representatives from the AAR were on the committee, AAR has taken the position that fair housing should remain a required topic. The Department considered this position, however, if concerned, the designated broker can require employees to attend fair housing as a condition of employment. Alternatively, licensees may choose to attend a fair housing class.

Additional examples have been included for showing good cause for the continuing education waiver. The rule also places a limit on the daily continuing education credits the Department will recognize.

Subsection (B) describes when the Commissioner is likely to consider a waiver of the continuing education requirement for license renewal and clarifies that if additional time is granted, the licensee is expected to complete the continuing education classes within the additional time allowed.

R4-28-402 License Examinations

This Section contains duplicative information found in A.R.S. §§ 32-2123(A), 32-2124 (B) and 32-2125.01 and that information has been stricken.

The amendment to Subsection (A) clarifies that the Department may contract with a third-party provider for the administration of the state examination, and that the exam is administered at least weekly, rather than on a monthly basis.

R4-28-403 Real Estate School Requirements; Course and Instructor Approval

Subsections (A) and (B) have been rewritten for clarity, and information currently required on the application is listed. Subsection (B) allows the applicant limited use of video and audio tapes as instructional aids.

Subsection (C) lists the qualifications for instructor approval and requires that an instructor receive approval before teaching.

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It is unnecessary for the Department to receive a copy of year-end documentation. Subsection (F), requiring unnecessary record duplication and storage, has been stricken.

The information currently in subsection (I) is found in A.R.S. §§ 32-2153(A)(1), (A)(3), (A)(5), (B)(1) and (B)(2), and R4-28-502. This information has been stricken.

New subsection (H) clarifies when written notice, a completed application or preapproval is required when any change occurs in a school, course or instructor, consistent with A.R.S. § 32-2135 and similar requirements on other "license" holders.

The information in subsection (J) overlaps the requirements in 41 A.R.S. 6, Article 6, Adjudicative Proceedings, and Article 10, Univorm Administrative Appeals Procedures, and has been stricken.

R4-28-502 Advertising by a Licensee

This Section, which is updated for clarity, includes the 'trade name' requirements transferred from R4-28-1001, and allows the terms 'group' and 'team' to be used. It also incorporates electronic media advertising.

A Certificate of Trade Name is no longer required and an applicant may apply to the Department for a name on a first-come, first-served basis. If the proposed name is not misleading or another licensee has not already been issued a license under a deceptively similar name, the applicant will obtain permission to use the name requested.

This Section clarifies that "Internet" or "web site" promotion by a licensee qualifies as advertising and is subject to the provisions of applicable statutes and rules.

R4-28-503 Promotional Activities

This Section deals only with promotional activities. Statute requirements for advertising material specifically prohibits any untrue statement of material fact or any omission of material fact which would make such statement misleading in light of the circumstances under which such statement was made. Since this prohibition is already specific with regards to false advertising, subsection (A) is unnecessary.

Subsection (D) contains information required on the application for operating a lottery, contest drawing or game of chance. Although the statutes require approval before a subdivider or membership campground operator may hold a lottery, or game of chance, no rule previously existed to implement the process or to identify what information is required.

R4-28-504 Development Advertising

Statutes clearly prohibit advertising of a development before approval except under a conditional approval or lot reservation which must be clearly identified. Subsection (A) has been stricken.

Statutes require a developer to submit advertising only upon request, making Subsection (B) unnecessary.

Subsections (C) through (F) are duplicative of statute and have been stricken. Adult and retirement community advertising requirements in subsection (P) is covered in statute and the federal fair housing act and has been stricken.

Elements of subsection (R) are in conflict with both Department practice and statutory provisions. The only time legitimate marketing may take place without a public report is under a conditional sales exemption while in process of obtaining a public report, and by utilizing lot reservations. In the case of a conditional sale, adequate disclosure is provided; in a lot reservation, the disclosure and sale price quote are not prohibited. This subsection has been stricken.

R4-28-701 Compensation Sharing; Disclosure

Subsection (A) has been rewritten for clarity. The last sentence of subsection (A) and subsection (B) were added to statute in 1997 (A.R.S. § 32-2152(B) and (C)) and have been stricken.

R4-28-802 Conveyance Documents

This Section has been edited for clarity and conciseness.

AAR believed our initial revision to this Section was too broad in that it required a salesperson or broker to provide to others a copy of any, or all, documents in a transaction. AAR's fear was that these documents may contain information to which the party was not entitled and should not have received. AAR believes that providing these documents would result in a violation of the broker's fiduciary duty and suggested that the broker or salesperson be required to provide a copy of an executed document only to the broker's or salesperson's "client." The Department believes this requirement would be too narrow. For example, in a "for sale by owner" situation, a broker representing the buyer should be obligated to provide the owner with a copy of the contract and addenda, if any, even though the seller is not the broker's "client."

Additionally, to eliminate the obligation of the "professional" in a real estate transaction to provide that each party signing a transaction document with a legible copy is, in the Department's opinion, moving in the wrong direction. Consequently, no substantive changes have been made to the Section.

R4-28-803 Contract Disclosures

This Section establishes specific language or placement of information on a contract and sets up the requirements for the developer.

The law does not require earnest money to be placed in an escrow account. The law does, however, prohibit commingling of escrow money. To verify the location of earnest money, subsection (C) requires that the contract disclose where the money will be deposited. Subsection (D) requires the Department to place a disclosure in the public report when a developer's contract provisions are inconsistent with any provision in A.R.S. § 32-2181, et seq, thereby warning the purchaser of possible problems. Statutes clearly require a developer to keep and maintain records of all sales transactions and to make them available for Department examination.

R4-28-804 Rescission of Contract

This Section has been edited for clarity and conciseness.

R4-28-805 Public Report Receipt

This Section contains, with editing, the public report receipt information currently found in R4-28-803. The burden of maintaining the receipt is placed upon the developer. The developer may designate another party to maintain the receipt, but this requirement will allow the Department to have only one responsible party to deal with.

R4-28-1001 Fictitious Name Requirements

It is important to be able to identify licensees through their fictitious names. However, when the protection of the public is considered, it is apparent the current rule is too restrictive. This proposed rule allows brokers to adopt fictitious names and contains information on fictitious

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names transferred from other rules.

The 'trade name' information has been moved to R4-28-502(J) and has been stricken from this Section.

R4-28-1002 Franchises
This new Section contains the information required from an applicant before a franchise is acquired, relinquished or transferred.

R4-28-1101 Duties To Client
This Section has been edited for clarity and conciseness.

R4-28-1102 Property Negotiations
This Section has been edited for clarity and conciseness.

Part A, Development, R4-28-A1201 through R4-28-A1223
This Part contains the information currently required when applying for a public report, or for a certificate of authority to operate a cemetery. It also includes the specific information required from a corporation, partnership, limited liability company, trust, and a subsidiary corporation.

Part B, General Information, R4-28-B1201 through R4-28-B1211
This Part contains general public report information and lists material changes that require amending the public report.

A public report must be amended whenever a change occurs that causes the public report to be incorrect or incomplete. However, if the change does not relate to information printed in the public report, no amendment to the public report is generally required.

In the proposed Section, the Department has tried to provide consumer protection while at the same time recognizing business practicalities. Notice to the Department of all changes is still required, but the Commissioner, in R4-28-B1203, has the flexibility to reclassify what would normally be a material change to a non-material change not requiring public report amendment.

If a developer amends a public report because of a material change, this Section allows the purchaser to cancel or rescind the purchase, provided the material change adversely impacts the purchaser and was caused by the developer, or an entity controlled by the developer, or the developer had actual knowledge of the material change at the time the real estate sales contract was executed by the purchaser or escrow closed. If the developer was not aware of and did not cause the material change, the purchaser may cancel the sales contract if the material change would adversely affect an occupant's health, safety or ability to make designated use of the lot and the purchaser has not completed performance under the contract and has not taken possession.

R4-28-1302 through R4-28-1313 Administrative Procedures
This Article has been edited to remove any requirement already covered in 41 A.R.S. 6, Article 6, Adjudicative Proceedings, and Article 10, Uniform Administrative Appeals Procedures.

Written comments on the proposed rules or preliminary economic, small business, and consumer impact statement must be received by 4:00 p.m., August 24, 1998 and may be addressed to:

Cindy Wilkinson
Arizona Department of Real Estate
2910 N. 44th St. Suite 100
Phoenix AZ 85018

Persons with a disability who wish to attend the public hearings may request a reasonable accommodation, such as a sign language interpreter, by contacting the Department's coordinator, Richard Simmonds, at (602) 468-1414 Ext. 160 (voice) or 1-800-367-3839 (TDD Relay). Requests should be made as early as possible to allow time to arrange the accommodation.

How to contact ADRE by phone, fax and modem

PHOENIX OFFICE

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Auditing and Investigations 500

Customer Services 100

Education & Licensing 345

Subdivisions 400

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